TAKUNDA NOWEL NYAMANJA
and
KINE BWANALI
and
NICKSON SIRIYA
and
ABUDUL YASINI
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHAREWA
HARARE, 28 September & 14 October 2021

Appeal against Refusal of Bail

Mr J Mangeyi, for appellants
Mr Chikosha, for respondent

CHAREWA J: The appellants are being charged with eight counts of unlawful entry into premises in aggravating circumstances as defined in s 131(2)(e) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23]*. They applied for bail pending trial which was dismissed by the magistrate's court sitting at Chinhoyi. This is an appeal against that decision refusing them bail.

In limine, the respondent objected to the bail statement in support of the appeal on the basis that it was more of heads of argument in that it included case law, and that there was no compliance with r91(1) of the High Court Rules 2021 (S.I. 202/2021)in that the statement did not include the grounds for refusal of bail in the court a quo.

In my view the point *in limine* lacks merit: there is no rule prohibiting the inclusion of case law in a bail statement. I take the view that what is not prohibited is allowed. In any event, given that there is no provision for heads of argument in bail applications, it is in the interest of justice and for the benefit of the court that relevant case law be cited. Nor am I convinced that the grounds for refusal of bail are not traversed. Part C at page 6 of the bail statement contains those grounds marked in bold type. The point *in limine* must be dismissed.

On the merits, the appellants take issue with the state response which they claim does not address the six issues which are raised as irregularities. I find this spurious as the appeal is not against the state response. Given that bail is a matter of the discretion of the court within the confines of the law, and that this court is entitled to even consider and render a decision without a state response, it matters not that the state may not have addressed the alleged irregularities. In any event, I do not agree that the state has not addressed the alleged irregularities: it may not have done so in the manner and style appellants wanted, but address them it did as will appear later in this judgment.

The appellants take issue with the magistrate's findings and decision on the basis that the ruling is most perfunctory and unconceivable (*sic)* and is devoid of any examination or analysis of their submissions. Further, the court a quo did not examine the credibility of the state evidence and appeared to be unaware of the law applicable to bail applications, particularly with reference to the presumption of innocence, how to determine propensity to commit further similar offences or likelihood of abscondment, that seriousness of an offence alone is not a ground for denying bail, propensity to commit further similar offences and that the court fell short as "a trier of facts to analyse and or examine the credibility, cogency and or probabilities of evidence placed before it in order to make a proper finding of fact which would be a basis for its ultimate decision."

For its part, the state submits that there is no misdirection warranting interference by this court because, in denying bail, the court a quo concluded, after listening to and accepting the testimony of the investigating officer, that appellants were not proper candidates for bail as they were likely to abscond, interfere with witnesses or commit further offences. This conclusion was predicated on the requirements of s 117(3)(b) upon which the court found that there was strong evidence linking appellants to the offence as they led to recoveries of stolen property identified by complainants; witnesses stay in the same area, are known to appellants, whose accomplices are still to be accounted for in circumstances where the same modus was employed in 8 counts of unlawful entry, which factors are in line with s 117(2)(iii) as read with s 117(3)(c); and finally appellants have several pending cases of unlawful entry which makes their release on bail inimical to the justice delivery system as envisioned in s 117(2)(iv) as read with s 117(3)(d) of the Criminal Procedure and Evidence Act.

While I must admit that the bail ruling is very brief and bereft of an in-depth and lengthy exposition of the governing principles and laws upon which the decision is based, it nonetheless covers the essentials. A reading of the bail ruling suggests that the learned magistrate believed everything submitted by the state and the police officer who testified. The witnesses not being before this court, it would be presumptuous to seek to overturn the magistrate's findings of credibility as the appellants seem to suggest this court should do. It is trite that an appellate court does not delve into issues of credibility of witnesses who were never before it. It appears therefore that the magistrate believed the police officer's testimony and dismissed the application for bail pending trial on the basis that

1. The offence is serious in circumstances where the state case is strong;
2. The nature of the offences suggests a propensity to commit further similar offences if released on bail as appellants have pending cases and some of their accomplices are still at large;
3. There is a likelihood to abscond as appellants gave a multiplicity of addresses;
4. The appellants led to the recovery of some of the stolen property which were identified by complainants; and
5. The appellants are likely to interfere with witnesses as they stay within the same neighbourhood in circumstances where appellants relatives have already attempted to assault the investigating officer over the same matter.
6. Therefore, releasing appellants on bail is not in the best interests of the justice delivery system.

Consequently, the whole of page 39 of the record is in fact the magistrate's reasoning wherein he then summed up the submissions by concluding that there are compelling reasons not to grant bail, the offence is serious as accused are facing eight counts of an offense which involves a direct invasion of privacy and the *modus operandi* employed (using keys to gain entry into people's houses) shows a propensity to commit further crimes.

It seems to me that appellants' legal practitioner has fallen into the error of quoting the concluding paragraph where the magistrate makes his findings as if it is the analysis of the testimony and submissions made before the court. While I (or anyone else) might have written the ruling differently, it must be recognised that judicial officers have different styles. What is important is whether the reasons for the decisions are evident in the ruling. As I have

summarised above, it seems to me that they are. And while the relevant law was not quoted, it is not fatal to a decision. I cannot find any irregularity that warrants my interference with the decision made, that appellants are not suitable candidates for bail.

Further, and in any event, even were I inclined to agree that there are irregularities committed by the magistrate, I would not have been obliged to grant appellants bail. I would have had to assess and analyse for myself whether there are compelling reasons to admit or not admit appellants to bail. The record clearly indicates that appellants are facing eight counts of unlawful entry in aggravating circumstances which suggests a course of conduct to criminal enterprise. While it is true that they are innocent until proven guilty, such presumption of innocence must be balanced against the need to safeguard the security, privacy and property rights of the public. At the end of the day, a balance must be struck between the interests of the individual and his right to liberty (which is not an absolute right), and the right to protection before the law of members of the public. Given the prevalent counts and pending similar cases, I would have been hard pressed to grant appellants bail. This is more so given that appellants reside and allegedly committed the offences in the same locality as the witnesses giving rise to fears of interference. Even were they to provide suitable alternative addresses, the question still arises as to whether it is in the interests of justice to grant them bail, given that the record reveals that accomplices are still at large and recoveries are yet to be made in full. Further, I take judicial notice that if appellants are convicted, no court can consider a non-custodial sentence. This raises a reasonable apprehension of abscondment as found by the magistrate.

In any event, I must emphasise that regardless of whether or not the appellate court, in the same circumstances, might have granted bail, refusal of bail can only be set aside where the court a quo misdirected itself. The law in relation to appeals against refusal of bail is trite and requires no restatement.

In the premises, I agree with the court a quo that, in the interests of justice, appellants are not suitable candidates for bail.

The appeal against refusal of bail is dismissed.

Mangeyi Law Chambers, appellant's legal practitioners

National Prosecuting Authority, respondent's legal practitioners